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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 19

LARRY GARA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 201–207) is reported at 178 F. 2d 38.

JURISDICTION

The judgment of the Court of Appeals was entered on November 28, 1949 (R. 201), and a petition for rehearing (R. 208–215) was denied on January 16, 1950 (R. 216). The petition for a writ of certiorari was filed on February 15, 1950, and was granted on April 3, 1950 (R. 216). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the courts below correctly ruled that petitioner had "knowingly counseled, aided and abetted" another to refuse to register under the Selective Service Act of 1948, in violation of Section 12 (a) of that Act.

2. Whether the application here made of Section 12 (a) of the Selective Service Act is consistent with the First Amendment guaranty of freedom of speech and religion.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The constitutional provisions, statutes, and regulations involved are set forth in the Appendix, *infra,* pp. 53–59.

STATEMENT

Count 2 of a two-count indictment (R. 2) filed on January 4, 1949, in the District Court for the Northern District of Ohio, charged that petitioner, on or about November 8, 1948, knowingly counseled, aided, and abetted one Charles Ray Rickert to refuse to register under the Selective Service Act of 1948, in violation of Section 12 (a) thereof (Appendix, *infra,* pp. 56–57).[1] Fol-

[1] Count 1, charging that petitioner, between June 24, 1948, and November 8, 1948, knowingly counseled, aided, and abetted "other individuals, the names of whom are unknown to this grand jury" to refuse or evade registration or service under the Act and to refuse to comply with rules and regulations issued thereunder (R. 2), was dismissed prior to trial on the Government's motion (R. 3, 177).

lowing a trial by jury, he was found guilty (R. 180) and sentenced to 18 months' imprisonment (R. 185) . On appeal to the Court of Appeals for the Sixth Circuit, the judgment of conviction was affirmed (R. 201).

The evidence adduced at the trial may be summarized as follows:

1. On November 8, 1948, the date of the offense of which he was convicted, petitioner, then 26 years of age (R. 118, 190), was Dean of Men and a teacher at Bluffton College, Bluffton, Ohio, an institution supported by the Christian sect known as Mennonites (R. 118, 123, 141–142). He was and is a member of the Religious Society of Friends, also known as Quakers (R. 118). He had previously, in 1942, been convicted, on his plea of *nolo contendere,* of refusing to register under the Selective Training and Service Act of 1940, and had thereafter served a prison sentence for that offense (R. 150–152, 123, 124).

Charles Ray Rickert was a fourth-year, pre-divinity student at Bluffton College in the fall of 1948 and was in one of petitioner's classes (R. 97, 107, 141). He lived in a room in Ropp Hall, a dormitory on the campus in which petitioner's apartment was also located (R. 102, 118, 123, 126, 127). Having been born in 1927, Rickert was required, by the terms of the Presidential Proclamation fixing dates for registering under the Selective Service Act of 1948 according to age

groups,[2] to register on either September 10 or 11, 1948 (R. 97). On September 10, 1948, Rickert appeared before his local draft board and "informed [the members of the board] that [he] was not registering" (R. 97).[3] He advised them that the reason why he was refusing to register was that he was a conscientious objector to war and conscription, and he gave them a letter, written by himself, in which he stated his position (R. 23, 98). He gave the board his name, address, and the year of his birth, but refused to give any of the remainder of the information necessary to register him under the Act, such as his exact birth date, place of birth, occupation, marital status, etc. (R. 21; see Gov. Ex. 1, R. 189). The members of the board "talked to him and tried to get him to change his mind" (R. 23), and explained to him the penalties for refusal to register (R. 24), but he "still refused to register; his mind was made up to that" (R. 24).[4]

2. Rickert, who testified at petitioner's trial as a defense witness (R. 97), stated that he first met petitioner on September 8 or 9, 1948, in a

[2] Proclamation 2799 of July 20, 1948 (13 F. R. 4173).

[3] Rickert had previously, upon attaining the age of 18, registered under the Selective Training and Service Act of 1940, and had been granted a deferment on the basis of his status as a divinity student (R. 107).

[4] Rickert never thereafter returned to his local board's offices and so was never registered (R. 22, 24). He was subsequently indicted, convicted upon a plea of guilty, and sentenced to 18 months' imprisonment for his refusal to register (Def. Exs. D and E, R. 197–198; R. 106).

classroom at Bluffton College (R. 99). On or about September 20, 1948, he testified, petitioner summoned him to his (petitioner's) dormitory suite and (R. 101)—

> * * * introduced himself at that time: the first time we were actually formally introduced. I had spoken to him before but not introduced by our names. He informed me he knew of a case from Bluffton College Campus, in which a non-registrant was involved for Selective Service. That was the first time he had mentioned registrant [sic] to me. I told him he was correct in seeking me, because I was the one. He informed me that during the Second World War he was in a similar position as mine. He had also refused to register for Selective Service because of his religious principles. He told me he had served a sentence, and was again convicted a second time, and served two sentences in various federal prisons.[5] I think at the time he asked me when I had come to my conclusion about registration. I mentioned at the time I was considering it the entire summer, the past summer, since the Act was made a law in the middle of June.
>
> * * * He also wished me the best of luck in the whole issue. At the time he also

[5] Actually, as later explained by petitioner from the witness stand, he was sentenced but once for refusing to register under the 1940 Selective Service Act, but his prison sentence was interrupted by a period of a few days during which he was at liberty on parole (see R. 147, 150–152).

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> asked me if I had heard any further from the draft board; if they had written a letter or sent me a questionnaire asking me to register once again. I told him no, I had received nothing.

A day or two later, according to Rickert, petitioner again asked him whether he had received (R. 101–102)—

> * * * any other word at all from either the Federal Bureau of Investigation or the Selective Service Board. That occurred frequently because the issue was on the table of course, and he was as interested, or nearly so, as I was.

Similar conversations occurred between petitioner and Rickert, according to the latter, "every few days, perhaps; sometimes maybe twice a day" (R. 102). In these conversations, petitioner kept inquiring of Rickert whether he had heard anything further from Selective Service authorities, recounted his own personal prison experiences, and advised Rickert as to what he might expect if sent to prison—"the kind of food," "the type of lighting," etc. (R. 108–109).

Petitioner himself gave like testimony as to the date of his first conversation with Rickert regarding the latter's refusal to register and as to the nature of that and subsequent conversations (R. 123–125, 137–145). He "congratulated" Rickert on learning of the latter's decision not to register; "told him that I too would refuse to

register; that I had refused to register in the last war"; and "probably told him good luck, as he left" (R. 123). Summarizing what he told Rickert in subsequent conversations on the subject, petitioner testified (R. 124, 125):

> Much that I told him concerned the type of future in store for him if he was convicted. He was curious about that. * * * A lot about prison routine and food and that sort of thing. Frequently it was merely a question of asking, "Has the government done anything or made a move"; so it was merely inquiries. A great percentage of these were inquiries. I would say we may have had prolonged conversations once a week, approximately.
>
> * * * * *
>
> I told him that we supported him; my wife and I agreed with him; we would also refuse to register for this draft if we were asked to do so; and we wanted as much as possible to identify ourselves with the men who were going to prison because our immunity rested with our age. I told him if at any point he felt his conscience directed him towards other actions, he should feel free to undertake another course of action. * * * I believe I told him that several times, because I was afraid my presence might influence him beyond his conscience if he were not clear; and I wanted to make sure he was clear.

On cross-examination, petitioner explained that, in saying he "wanted to make sure

[Rickert] was clear," he meant he wanted to be sure that Rickert was "inwardly prepared," as the result of deep conscientious conviction, to suffer the legal consequences of deliberate violation of the registration requirements of the Selective Service Act (R. 137–138). "I meant that the fact that I took this position and my wife took this position should not push him into continuing if at any moment he was not convinced he should continue, inwardly; * * * I was not sure whether he was as inwardly prepared as I am now that he is" (R. 142). "I have seen so many people cracking up when they take positions for which they are not ready. I have seen the prison system break conscientious objectors who were not prepared to take what they had to offer. * * * I do not want people who hold a position to be broken. * * * I wanted to make sure in this particular case he realized the consequences were heavy, because I had seen men become embittered" (R. 143).[6]

---

[6] Petitioner's testimony that he was careful to make sure that Rickert was "inwardly prepared" to accept the consequences of deliberate violation of the registration requirements of the law before he encouraged him in his stand should be weighed in the light of the fact that on August 25, 1948, as he admitted to agents of the Federal Bureau of Investigation (see *infra*, pp. 12–13), he delivered a speech to a group of "people of all ages," including men "of legal draft age," none of whom he knew personally, advocating "that men of draft age refuse to register under the Selective Service Act of 1948."

See also petitioner's letter of November 8, 1948, to the

3. On November 8, 1948, Special Agent William Tootell of the Federal Bureau of Investigation and Deputy Sheriff Loren Fairall, possessing a warrant for the arrest of Rickert for refusing to register, arrived at Ropp Hall on the Bluffton College campus for the purpose of taking Rickert into custody (R. 27–28, 29, 69). At the entrance to the dormitory, they met petitioner, who, upon learning the identity of the officers and the purpose of their visit, said to them, "Well, you cannot take Rickert unless you take my wife and me. We are just as guilty as he, for we told him not to register" (R. 28–29, 69–70).[7] The officers proceeded up a flight of stairs

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United States Attorney in Toledo (quoted in full at pp. 10–12, *infra*), in which he stated that "* * * We [petitioner and his wife] have openly urged young men to take this position [refusal to register] and shall do all in our power to further the cause of civil disobedience to conscription in this country. * * *"

[7] Petitioner testified that he said to the officers, "If you take Charles [Rickert], you will have to take my wife and me because we advocate the same position, and we would do the same thing" (R. 126).

Agent Tootell testified that on November 15, 1948, a week following the arrest of Rickert, when he and a fellow agent interviewed and took a statement from petitioner (see pp. 12–13, *infra*), he questioned petitioner regarding the latter's statement of November 8th that he had "told [Rickert] not to register"; and that petitioner then told him that he "might have said that in his excitement, but that it was not true; that in fact he had not known Mr. Rickert prior to September 10, 1948; and therefore could not have counseled him to refuse to register prior to that date" (R. 59; see also R. 31, 58–61, 76, 77–78, 113, 116–117, 128).

to Rickert's room and observed petitioner, who had gone ahead of the officers up a different flight of stairs (R. 126), "ushering Mr. Rickert from an adjoining room into his own room" (R. 29, 70). The officers followed into Rickert's room, where petitioner "placed his right hand on Mr. Rickert's left shoulder, and said, 'Stand by your principles. Do not let them coerce you into registering'" (R. 29, 70). The officers served the arrest warrant on Rickert, who willingly left with them (R. 29). As Rickert and the officers were leaving, petitioner said to Rickert, "Do not let them change your mind" (R. 70).[8]

4. On the same day on which Rickert was arrested, November 8, 1948, petitioner wrote the following letter, also signed by petitioner's wife, to the United States Attorney in Toledo (Gov. Ex. 8, R. 194–195):

> We have just learned of the arrest of Charles Rickert, a student at Bluffton College who, as a conscientious objector to war and conscription has refused to register for the draft. We have been very much concerned about the imprisonment of

[8] Rickert testified that petitioner's statement was, "[D]o not let them coerce you into changing your mind" (R. 110). Petitioner was uncertain whether he used the words "your mind" or "your conscience" (R. 127).

young war objectors. It especially concerns us since we would also refuse to register for the draft if we were asked to do so. We have openly urged young men to take this position and shall do all in our power to further the cause of civil disobedience to conscription in this country. If men like Charles are guilty then we, too, are guilty for we have advocated disobedience to the law and have supported men who take this position.

This imprisoning of young idealists, action apparently designed to break their spirits and force their submission to the demands of the government seems to us a terrible break with our American heritage of freedom. If one believes that war and conscription for war are crimes against humanity then he has a moral obligation to reject these practices and obey the moral law as he sees it. If the course that Charles and others like him have chosen is a criminal one, then we should also be prosecuted for committing a breach of the law. However, we do not believe that this is a criminal act and feel that the government should reject the idea of punishment in these cases. If our government continues to punish men of conscience then we shall do everything in our power to identify ourselves with these men and tell every American citizen of the persecution for

> righteousness' sake that is taking place in our land.[9]

5. On November 15, 1948, petitioner made the following voluntary statements to Agent Tootell and another F. B. I agent, who reduced them to writing (Gov. Exs. 2A and 2B, R. 190–191; R. 30–33, 43, 57–58, 74–81):[10]

> At 8 p. m. on or about August 25, 1948, I made a speech at a special meeting on Civil Disobedience held at the Friend's Meeting House located on North Sixth Street between Walnut and Washington Streets in Reading, Pennsylvania. This was an open meeting with people of all ages present. There appeared to be men present of legal draft age—ages 18 to 25, but I do not know the names and addresses of any of them.

---

[9] This letter was admitted in evidence for the limited purpose of showing petitioner's intent in doing the act charged in the indictment (R. 47, 166–167).

Petitioner had previously, on September 30, 1948, written a letter of identical import to the Attorney General, protesting against a prison sentence imposed on a different conscientious objector for refusing to register (Gov. Ex. 7, R. 192–193). And subsequently, on November 12, 1948, he addressed a letter to the United States Attorney in Chicago, also of identical import, protesting against the arrest of yet another conscientious objector for refusing to register (Gov. Ex. 9, R. 195–196). These letters were likewise received in evidence exclusively for the purpose of showing intent (R. 47, 166–167).

[10] Petitioner did not sign this document because, he testified, he did not like its "tone" and wanted to "think it over" (R. 129). He did not deny, however, that he made the statements contained in it.

I made this speech for the specific purpose of aligning myself with those men who were refusing to register under the Selective Service Act of 1948. In this speech I advocated that men of draft age refuse to register under the Selective Service Act of 1948. In making this speech I intended to violate the Selective Service Act.

On November 8, 1948, I told Charles Ray Rickert of Ropp Hall, Bluffton, Ohio, "Stand by your principles, don't let them coerce you into registering." I made the above statement in the presence of Special Agent Tootell and a Deputy Sheriff of Allen County. At the time I made the above statement I knew Rickert was of draft age and that he had already refused to register for Selective Service on September 10, 1948.

Following the passage of the Selective Service Act of 1948 I signed an open letter entitled, "A Call to American Christians of Draft Age" published by the Peacemakers of 2013 Fifth Ave., New York 35, N. Y. This open letter advocates refusal to register for the draft.[11]

6. Petitioner testified that he was a pacifist and an active member of the Society of Friends,

[11] The first, second, and fourth paragraphs of petitioner's statement to the Agents, like his letters to the Attorney General and two United States Attorneys (see pp. 10–12 and fn. 9, supra), were admitted only for the purpose of showing the intent with which he did the act charged in the indictment (R. 44–46, 166–167).

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or Quakers (R. 118–120, 122); that, as such, he conscientiously felt that "wars are wrong, and that especially are wars wrong in our age, and really a form of race suicide" (R. 122); that he believed that a draft law is an immoral law, which people who are convinced of its immorality have an obligation to violate (R. 133); that he had espoused these views publicly in speeches he had made and an article he had written (R. 122); and that he had made it a point to become acquainted with all nonregistrants who are conscientiously opposed to conscription, and to support and identify himself with such persons if he felt they were "inwardly prepared" to assume the responsibilities and consequences of refusal to register (R. 137). He also testified that he had identified himself with, and that his views coincided with those of, the "Peacemakers," an "informal movement, including many, notably, Christian ministers" (R. 122), and that he had signed the following pledge (Gov. Ex. 3, R. 192; R. 63–65, 122):

> PEACEMAKERS, Mt. Morris House,
> 2013 Fifth Avenue, New York 35, N. Y.
>
> I am in agreement with the Open Letter [see p. 13, *supra*]. I shall do what I can to spread its message. If a youth of draft age, I plan not to register or serve under the Draft; if not, I shall in every way possible assist and support Non-registrants.

SUMMARY OF ARGUMENT

I

The evidence that petitioner counseled, aided, and abetted Rickert in his refusal to register under the Selective Service Act of 1948 is clear, and petitioner's attempts to deny the applicability of Section 12 (a) of that Act must fail.

A. It is of no consequence that Rickert had already refused to register before the date on which petitioner is alleged to have counseled a refusal, for Section 611.6 (d) of the Selective Service Regulations makes the duty to register a continuing one. This regulation, being a reasonable implementation of the duty to register prescribed by Section 3 of the Act, which specifically authorizes the promulgation of regulations, was validly issued. *Fogel* v. *United States*, 162 F. 2d 54, 55 (C. A. 5), certiorari denied, 332 U. S. 791.

The regulation does not, as petitioner contends, prescribe a penalty for refusing to register; the penalty is imposed by statute, and though the offense is a continuing one, it is single and not multiple and there is no merit in the argument that the regulation makes each day of refusal a separate crime.

The indictment accurately charged the crime of which petitioner was convicted; the record makes clear that, from the very beginning of the trial,

he was aware of the precise nature of the charge against him.

B. Petitioner's inconsistent argument that he could not be convicted of violating Section 12 (a) because Rickert had already complied with the registration requirements is equally baseless. When Rickert, before the date of the offense charged against petitioner, appeared before his draft board, he withheld information required for registration. While a person directed to register may comply notwithstanding his refusal to sign the registration card, there is no compliance where, in addition, the necessary information is denied the Board. Indeed, Rickert admitted that he had not registered and his plea of guilty to a charge of refusal to register resulted in his imprisonment.

C. On the record in this case, it was within the jury's province to find that petitioner told Rickert "not to register", and did not merely offer comfort or moral support to Rickert in the position he had been led by his conscience to take. Hence, no question is presented as to whether Section 12 (a) would reach the mere tender of "moral comfort" to a recalcitrant registrant. Petitioner constantly reiterated his purpose to violate the Selective Service Act, and his effort now to deny that he accomplished what he set out to do must come to naught.

II

On the assumption that the freedoms guaranteed by the First Amendment are absolute and unqualified, petitioner challenges the validity of Section 12 (a) of the Selective Service Act as applied to him to make punishable his expressions of religious conviction. But this challenge must fall with the assumption on which it is founded, for this Court has time and again rejected the absolutist theory of the First Amendment. See, *e. g., Reynolds* v. *United States,* 98 U. S. 145, 161–167; *Schenck* v. *United States,* 249 U. S. 47; *Cox* v. *New Hampshire,* 312 U. S. 569; *Prince* v. *Massachusetts,* 321 U. S. 158. Since it is plainly within the powers specifically conferred on Congress by the Constitution to penalize wilful refusal to register, regardless of the entertainment of religious scruples against registration (see *United States* v. *Macintosh,* 283 U. S. 605, 623–624), it is equally plain that Congress can constitutionally provide for the punishment of all who counsel others to refuse to register, even though such counsel derives from religious conviction. *Warren* v. *United States,* 177 F. 2d 596 (C. A. 10), certiorari denied, 338 U. S. 947.

III

Petitioner is driven then, albeit reluctantly, to reliance on the argument that the "clear and present danger" test is applicable and that the

conditions it imposes have not been fulfilled. But petitioner never complained to the trial court, as he does to this Court, of the failure of the trial judge to submit the question of clear and present danger to the jury. And even if petitioner could now complain of this failure, it is clear that words of counseling the commission of crime are among those "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem" (*Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 571–572), much less any problem of "clear and present danger." Furthermore, petitioner's complaint would run afoul of *Gitlow* v. *New York,* 268 U. S. 652, 670–671. The statute here involves a specific prohibition against the use of language, *i. e.,* counseling refusal of registration. Consequently, the rule there announced, that when "the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration" governs here.

In any event, even if the "clear and present danger" test were applicable, its requirements have been fulfilled. The relationship between the petitioner and Rickert, dean and student,

makes it evident, even if it were not otherwise plain, that petitioner's counsel to Rickert "not to register" created a clear and present danger that Rickert would not register. And the substantive evil involved, interference with the process of conscription, is a serious one. *Falbo* v. *United States,* 320 U. S. 549, 551.

This Court has, moreover, given a sweeping answer to challenges of the sort petitioner makes here. In *Giboney* v. *Empire Storage Co.,* 336 U. S. 490, 502, Mr. Justice Black, speaking for a unanimous court, said: "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."

ARGUMENT

I

PETITIONER VIOLATED SECTION 12 (a) OF THE SELECTIVE SERVICE ACT OF 1948

On the statutory plane, petitioner's argument can be distilled into three distinct and sometimes contradictory contentions. He asserts that (1) since Rickert had refused to register before meeting petitioner, petitioner could not have been guilty of counseling, aiding, or abetting him in his refusal to register (Br. 24–26); (2) since Rickert had already done "whatever the law re-

quired him to do," *i. e.*, "to present himself for and submit to registration," petitioner could not properly be convicted of counseling, aiding, or abetting a refusal to register (Br. 26–27); and (3) since petitioner merely told Rickert to "follow his conscience," he cannot properly be said to have counselled, aided, or abetted a refusal to register (Br. 7, 10). These contentions are without merit.

A. *The duty to register which petitioner counseled, aided, and abetted Rickert to refuse to perform is validly made a continuing one by Selective Service Regulation 611.6 (d).*—Petitioner's view (Br. 24–26) is that he could not lawfully be convicted of counseling Rickert, on November 8, 1948, to refuse to register since Rickert had already refused to register, on September 10, 1948, the latter date being one of the two days fixed by Presidential Proclamation for persons of Rickert's age group to register (see pp. 3–4, *supra*). But Rickert's duty to register did not cease on September 10, 1948. It continued beyond that date, and existed on November 8, 1948, when petitioner, as charged in the indictment (*supra,* p. 2) and as established by the evidence (*supra,* pp. 9, 10), "told [Rickert] not to register." Section 611.6 (d) of the Selective Service Regulations (Appendix, *infra,* p. 57), then and still in force, provides:

> The duty of every person subject to registration to present himself for and

> submit to registration shall continue at all times, and if for any reason any such person is not registered on the day or one of the days fixed for his registration, he shall immediately present himself for and submit to registration before the local board in the area where he happens to be.

Petitioner, however, challenges the validity of the above regulation on the ground that it amounts to an encroachment on the legislative function of defining offenses and prescribing their penalties. He asserts that the regulation "fixes a new crime (continuing refusal to submit to registration) and a new penalty (separate penalty for each day), contrary to" the "fundamental law that only Congress can create a crime and fix its punishment" (Br. 28). This argument is baseless.

Section 3 of the Act (Appendix, *infra*, p. 54) imposes the duty of registration: "* * * [I]t shall be the duty of every male [person subject to its terms] * * * to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President *and by rules and regulations prescribed hereunder.*" [Italics supplied.] The regulation is a reasonable implementation of the duty so prescribed; it simply requires that a person who "for any reason" is not registered on the initial date or dates fixed for his registration

shall be under a continuing duty to register. The validity of a substantially identical regulation (§ 611.5 (d), 6 F. R. 6842) issued under the Selective Training and Service Act of 1940 was sustained in *Fogel* v. *United States,* 162 F. 2d 54, 55 (C. A. 5), certiorari denied, 332 U. S. 791. There, in a prosecution for wilful failure to register, commenced more than three years after the registration date fixed by Presidential Proclamation, the statute of limitations was set up as a bar to the prosecution. The trial court overruled the plea in bar, and Fogel was convicted and appealed. The Fifth Circuit affirmed. After referring to the regulation in question, the court observed (162 F. 2d at 55):

> * * * This regulation was notice to all persons that registration was a continuing obligation and that every day was a day for registration. The duty of Fogel to register being a continuing obligation, his failure to register was a continuing offense—an offense that continued right up to the date of the finding of the indictment. Therefore, the three-year statute of limitations did not operate to bar the prosecution.[12]

[12] See also *United States* v. *Guertler*, 147 F. 2d 796, 797 (C. A. 2), certiorari denied, 325 U. S. 879, holding that the failure of a registrant to keep his draft board advised of his address was a continuing offense. Similarly, other continuing failures to perform duties imposed by law have been held to constitute continuing offenses. *United States* v. *Belfast Fabrics Corporation*, 65 F. Supp. 567 (S. D. N. Y.)

Nor does the regulation, as petitioner argues, prescribe a penalty for the offense of refusing to

(failure to keep records as required by law); *United States* v. *Nazzaro*, 65 F. Supp. 456 (S. D. N. Y.) (concealment of assets of a bankrupt). The classic example of a continuing offense is conspiracy. *Hyde* v. *United States*, 225 U. S. 347, 369–370; *United States* v. *Kissel*, 218 U. S. 601, 607–608; *Blue* v. *United States*, 138 F. 2d 351, 360 (C. A. 6), certiorari denied, 322 U. S. 736; *United States* v. *Perlstein*, 126 F. 2d 789, 798 (C. A. 3), certiorari denied, 316 U. S. 678. A conspiracy is a "completed offense," in the sense that it is a punishable crime, upon the formation of the criminal agreement (and the commission of an overt act in furtherance of it, where the statute so requires); but the conspiracy, nevertheless, continues until its purpose is accomplished or abandoned (*United States* v. *Kissel*, *supra*, 218 U. S. at 607–608), or, as to any given conspirator, until he takes positive action to withdraw from the criminal venture (*Hyde* v. *United States*, *supra*, 225 U. S. at 369–370).

United States v. *Irvine*, 98 U. S. 450, relied on by the dissenting judge in the *Fogel* case (162 F. 2d at 56), is not in conflict with the *Fogel* decision. That case involved a prosecution for wrongfully withholding from a pensioner money owing her. The prosecution was commenced more than two years (the limitations period) after it had become evident that the withholding was deliberate and wrongful. This Court held the prosecution to be barred by the statute of limitations. But the offense in the *Irvine* case was not declared to be continuous in nature by the statute which created it (Act of July 4, 1864, c. 247, § 13, 13 Stat. 389), or by any regulation thereunder. In the *Fogel* case, on the other hand, as in the case at bar, a regulation duly promulgated under the controlling statute made the duty to register continuous, with the consequence that continued failure to register was properly held a continuing offense.

Compare *Warren* v. *United States*, 199 Fed. 753 (C. A. 5), holding that a prosecution under § 29 (b) (1) of the Bankruptcy Act of 1898, 30 Stat. 554, for concealing property of a bankrupt from the trustee, commenced more than one year after the act of concealment, was barred by the one-year

register. Section 12 (a) of the Act (Appendix, *infra*, pp. 56–57) defines the offenses and fixes the penalties. Although refusal to register is a continuing offense by virtue of the continuing duty imposed by the regulation, such refusal, contrary to petitioner's assertion, constitutes but one offense, and not a separate offense for each day the refusal continues.[13] The offense of con-

statute of limitations fixed by § 29 (d) of the Act. Thereafter, Congress, having amended § 29 (d) in 1926 to make the limitations period three years instead of one (Act of May 27, 1926, c. 406, § 11, 44 Stat. 665–666), again amended § 29 (d) in 1938 by adding the following *proviso* (Act of June 22, 1938, c. 575, § 1, 52 Stat. 840, 856): "*Provided*, That the offense of concealment of assets of a bankrupt shall be deemed to be a continuing offense until the bankrupt shall have been finally discharged * * *." See 11 U. S. C. [1946 ed.] 52 (d). In consequence of this legislative change, making concealment a continuing offense, it was held in *United States* v. *Nazzaro*, *supra*, 65 F. Supp. 456, that an indictment brought more than three years after concealment was not barred by the statute of limitations, the bankrupt not having in the meantime been discharged.

United States v. *Salberg*, 287 Fed. 208 (N. D. Ohio), involved a prosecution for failing to register under the Selective Service Act of 1917. The prosecution, commenced more than three years after the date on which the defendant should have registered, was held barred by the statute of limitations. But there, neither the statute nor any regulation thereunder, made the duty to register a continuing obligation. The case is thus plainly distinguishable from the *Fogel* case.

[13] Petitioner asserts that "the regulation has made each day of refusal of registration a separate crime" and argues, therefore, that, under the regulation, a person who refused for thirty days to register would be subject to imprisonment for 30 times the five-year maximum allowable term of imprisonment, and to a fine of 30 times the $10,000 maximum allow-

tinued refusal to register is, in this respect, like the offense of conspiracy. A conspiracy may continue from day to day, or even from year to year. But that characteristic of the offense does not make the crime multiple. As this Court observed in *United States* v. *Kissel, supra,* 218 U. S. at 607, "it is a perversion of natural thought and of natural language to call such continuous cooperation [among conspirators] a cinematographic series of distinct conspiracies, rather than to call it a single one." For the same reasons, it is a perversion of the plain language and meaning of Regulation 611.6 (d) to argue, as does petitioner, that the result of the regulation is to make continued refusal to register multiple offenses.

Regulation 611.6 (d) is valid as a reasonable implementation of the registration requirements of the Act. Accordingly, on November 8, 1948, Rickert was under a continuing duty to register. Petitioner's conduct in counseling Rickert to persist in his refusal to register was, therefore, squarely within the prohibition of Section 12 (a),

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able fine, fixed by Section 12 (a) of the Act, "contrary to the obvious intendment of the statute" (Br. 28). The absurdity of the suggested conclusion suffices to demonstrate the inaccuracy of the premise. The regulation does not make "each day of refusal of registration a separate crime," any more than it makes each hour or each minute of refusal to register a separate crime. It simply imposes a continuing duty to register. But the offense, though of a continuing nature, is one. Cf. *United States* v. *Kissel, supra,* 218 U. S. at 607.

and that was the statutory provision whose violation the indictment charged. The failure of the indictment in specific words to allege that petitioner counseled Rickert to *continue* to refuse to register, of which petitioner makes much (Br. 24–26), is not error at all. For an indictment such as this, charging violation of a specific statutory section which, in turn, refers to regulations to be issued thereunder, is certainly sufficient to apprise the defendant of the crime of which he is accused. Petitioner distorts the record, moreover, in asserting (Br. 26) that "the shifted charge was not known to petitioner until the instructions of the Trial Court were given." The facts are that almost the first word spoken at the trial was a reading by the United States Attorney, during his opening statement (R. 11), of Regulation 611.6 (d), imposing a continuing duty to register, and that the opening statement of defense counsel (R. 15–17) outlined the same argument—that petitioner could not counsel Rickert to refuse when he had already refused—as is made in this Court. Petitioner was not surprised by the judge's charge; his sole complaint was that he disagreed with it (R. 174–175).

This case is distinctly different from *Fogel* v. *United States,* 335 U. S. 865, reversing on the Government's confession of error, 167 F. 2d 763 (C. A. 5). There, Fogel was charged with being under 45 years of age and having failed to register, as required, on February 16, 1942. He was

sought to be convicted on the ground that, being over 45, he was required, but nevertheless, failed to register on April 27, 1942. "The whole controversy in [Fogel's] trial was whether he was under 45, or over 45." 167 F. 2d at 765. When it appeared from evidence made available after judgment of conviction that Fogel was over 45, this Court refused to allow his conviction, based on the premise that he was under 45, to stand. There was no such changing of ground in this case as there was in Fogel's.

B. *Rickert had not already complied with the registration requirements of the Act when petitioner counseled a refusal to register.*—Petitioner contends that his conviction of counseling Rickert, on November 8, 1948, to continue his refusal to register, was logically impossible because Rickert had in fact already registered, on September 10, 1948 (Br. 26–27). It will be observed that this contention is inconsistent with petitioner's other contention, answered under A, *supra,* pp. 20–27, that he could not properly be convicted of counseling Rickert, on November 8, 1948, to refuse to register, since Rickert had already *refused to register* on September 10, 1948. But apart from its lack of consistency, it is clear that there is no substance in the contention.

Rickert did not register on September 10, 1948, or at any other time. He himself admitted at petitioner's trial that he did not register (R. 97), and in fact he pleaded guilty to an indictment

charging him with refusal to register, and was sentenced to 18 months' imprisonment therefor (see fn. 4, *supra,* p. 4). He appeared before his draft board on September 10, 1948, and gave the board his name, address, and the year of his birth, but he refused to give any of the other information necessary to register him under the Act (see p. 4, *supra*). This manifestly did not constitute compliance with the duty imposed by Section 3 of the Act "to present himself for and submit to registration." It is true that where a person appears before his local board and gives the registrar all the information needed to register him, but "is unable or refuses to sign the Registration Card", the regulations provide that the registrar shall sign the registrant's name for him and that "the act of the registrar in so doing shall have the same force and effect as if such registrant had signed the Registration Card * * *, and such registrant shall thereby be registered." See §§ 613.11 and 613.13 of the Selective Service Regulations (Appendix, *infra,* pp. 57–58). But it is clear from Regulation 613.16, *infra,* p. 59, that where any information needed to register a person is withheld by him, he does not comply with the registration requirements and is not registered. It was solely the failure of the Government to prove more than the defendant's refusal to sign his registration card—that is, the failure to prove that he "refused to give all information necessary for the registrar to make the

required entries on the registration card"—that resulted in the reversal of a conviction of a refusal to register in *United States* v. *Norton,* 179 F. 2d 527, 529 (C. A. 2). Petitioner's reliance on that decision is therefore plainly misplaced.

C. *Petitioner did not simply advise Rickert to follow his conscience wherever it might lead him; he counseled, aided, and abetted a refusal to register.*—Petitioner contends that he could not be convicted of violating Section 12 (a) because he simply told Rickert to "follow his conscience". He urges that Congress, in proscribing counseling, aiding or abetting a refusal to register, did not intend to reach the giving of "moral comfort". See Br. 18, 7, 10, 19–20, 21.

The short answer to this contention is that it is not presented by the record in this case. As the court below stated: "We do not have a mere attempt on appellant's part to comfort or give moral support to some one who is paying the penalty for his refusal to register" (R. 207). The jury was entitled to find not merely that Rickert was advised to "follow his conscience", but that petitioner "congratulated" him on his refusal (R. 123), "supported him" (R. 125), and "told him not to register" (R. 70). Such explanations as petitioner offered for his statement to the arresting officers that he had "told [Rickert] not to register" (see *supra,* fn. 7, p. 9) were undoubtedly weighed by the jury in the light of petitioner's letters to United States Attorneys,

and the Attorney General, and a speech delivered to a group including men of draft age. In the letters, petitioner stated: "we have advocated disobedience to the law" (R. 194); "my wife and I would both refuse to register for the draft if we were asked to do so. I have publicly advocated this position and shall continue doing all in my power to further the cause of civil disobedience in this country" (R. 196); "my wife and I have been publicly and openly advocating that Christians should disobey the draft law and will encourage any young man that we know is taking this position" (R. 193). Of his speech, petitioner said: "I made this speech for the specific purpose of aligning myself with those men who were refusing to register under the Selective Service Act of 1948. In this speech I advocated that men of draft age refuse to register under the Selective Service Act of 1948. *In making this speech I intended to violate the Selective Service Act.*" [R. 190–191, italics supplied.] It is clear that petitioner did what he intended to do.

II

SECTION 12 (a) OF THE SELECTIVE SERVICE ACT OF 1948, MAKING IT AN OFFENSE FOR ANY PERSON KNOWINGLY TO COUNSEL ANOTHER TO REFUSE TO REGISTER UNDER THE ACT, IS VALID AS APPLIED TO CONSCIENTIOUS OBJECTORS TO WAR AND CONSCRIPTION

Petitioner contends that the First Amendment, proscribing the making of any law prohibiting the free exercise of religion or abridging free-

dom of speech, stands as a constitutional bar to the enforcement against him, a conscientious objector on religious grounds to war and conscription, of Section 12 (a) of the Selective Service Act of 1948, making it an offense for any person knowingly to counsel another to refuse to register under the Act (Br. 7–16). But this contention is founded on the mistaken assumption, rejected as often as it has been advanced in this Court,[14] that the freedoms guar-

[14] See, *e. g.*, *Reynolds* v. *United States*, 98 U. S. 145, 161–167 (sustaining as against religious believers in polygamy, a federal statute making the contraction of a polygamous marriage a crime); *Schenck* v. *United States*, 249 U. S. 47 (sustaining the Espionage Act of 1917, making criminal the obstruction of recruiting in wartime, as applied to the circulation of a document criticizing conscription in impassioned language); *Frohwerk* v. *United States*, 249 U. S. 204 (same; newspaper articles); *Debs* v. *United States*, 249 U. S. 211 (same; speech); *Abrams* v. *United States*, 250 U. S. 616 (same; pamphlets); *Schaefer* v. *United States*, 251 U. S. 466 (same; newspaper articles); *Gitlow* v. *New York*, 268 U. S. 652, 666–671 (sustaining a state statute making it a crime to advocate the violent overthrow of organized government); *Whitney* v. *California*, 274 U. S. 357, 371–372 (same); *Cox* v. *New Hampshire*, 312 U. S. 569 (sustaining a state statute requiring that all street parades be licensed and regulated, as against a religious group conducting such a parade); *Prince* v. *Massachusetts*, 321 U. S. 158 (sustaining a state statute prohibiting children from selling magazines, etc., in public places, as against a member of a religious group with whose religious convictions compliance with the statute interfered). See also *Davis* v. *Beason*, 133 U. S. 333, 342–343; *Mormon Church* v. *United States*, 136 U. S. 1, 50; *DeJonge* v. *Oregon*, 299 U. S. 353, 363–365; *Herndon* v. *Lowry*, 301 U. S. 242, 256–261; *Schneider* v. *State*, 308 U. S. 147, 160–161; *Cantwell* v. *Connecticut*, 310 U. S. 296, 303–304, 308; *Cha-*

anteed by the First Amendment are absolute and unqualified. As this Court pointed out in *Davis* v. *Beason,* 133 U. S. 333, 342-343—

> * * * The first amendment to the Constitution, in declaring that Congress shall make no law respecting the establishment of religion, or forbidding the free exercise thereof, was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others * * *. It was never intended or supposed that the amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with. However free the exercise of religion may be, it must be

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plinsky v. *New Hampshire*, 315 U. S. 568, 572; *Murdock* v. *Pennsylvania*, 319 U. S. 105, 110; *Martin* v. *Struthers*, 319 U. S. 141, 143; *Board of Education* v. *Barnette*, 319 U. S. 624, 633, 639.

> subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation. * * * [15]

What petitioner's argument overlooks is that the same Constitution whose First Amendment he invokes confers on Congress the power to "declare War," to "raise and support Armies," to "provide and maintain a Navy," and to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers" (Art. I, Sec. 8, Appendix, *infra*, p. 53). And since "the mind cannot conceive an army without the men to compose it," the cited provisions plainly bestow on Congress the power to build an armed force by the processes of conscription. *Selective Draft Law Cases*, 245 U. S. 366, 377.

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[15] Compare: * * * Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. * * * [W]hen the offence consists of a positive act which is knowingly done, it would be dangerous to hold that the offender might escape punishment because he religiously believed the law which he had broken ought never to have been made * * * (*Reynolds* v. *United States*, 98 U. S. 145, 166–167).

* * * No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect * * * (*Cantwell* v. *Connecticut*, 310 U. S. 296, 308).

* * * One would not be justified in ignoring the familiar red traffic light because he thought it his religious duty to disobey the municipal command * * * (*Cox* v. *New Hampshire*, 312 U. S. 569, 574).

Registration under a draft law being the first and an indispensable step in the conscriptive process—the means whereby the Government inventories and classifies the Nation's available manpower—it is clear that Congress can constitutionally compel all men, within such age limits as it may see fit to specify, to register for selective service, and no religious or conscientious scruple against registration, however deeply or sincerely entertained, can exempt a person from the duty of registering, where Congress has not done so. *Richter* v. *United States,* 181 F. 2d 591, 592–594 (C. A. 9); *United States* v. *Henderson,* 180 F. 2d 711, 713–716 (C. A. 7), certiorari denied, 339 U. S. 963. And since Congress can penalize wilful refusal to register, regardless of the entertainment of religious scruples against registering, it is equally plain that Congress can constitutionally provide for the punishment of all who counsel others to refuse to register, notwithstanding that the persons so counseling may conceive it their religious duty to do so.[16] *Warren* v. *United States,* 177 F. 2d 596 (C. A. 10), certiorari denied, 338 U. S. 947; *Baxley* v. *United States,* 134 F. 2d 937, 938 (C. A. 4); *Fraina* v. *United States,* 255

[16] It is to be noted that Congress, by specifically providing for punishment of any person "who knowingly counsels, aids, or abets another to refuse or evade registration" (Section 12 (a), *infra*, pp. 56–57), has made such counseling, aiding, or abetting "a primary and not an accessorial offense" (*Warren* v. *United States*, 177 F. 2d 596, 598 (C. A. 10), certiorari denied, 338 U. S. 947).

Fed. 28, 36 (C. A. 2). As remarked in *Warren* v. *United States, supra,* 177 F. 2d at 599–600:

> It is one thing for a person to entertain religious beliefs, to express those beliefs, and to teach them to his children. It is another thing to counsel and urge violation of valid penal legislation. "Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it [the First Amendment] safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society" [citing *Cantwell* v. *Connecticut,* 310 U. S. 296, 303–304].

It is important to emphasize that this case presents no question as to the power of Congress under the Constitution to compel military service by conscientious objectors to warfare in any form.[17] For Congress has never sought to do so.

[17] The existence of this power, however, is not to be doubted. *In re Grimley,* 137 U. S. 147, 153; *Jacobson* v. *Massachusetts,* 197 U. S. 11, 29; *United States* v. *Macintosh,* 283 U. S. 605, 623–624. "This [contention that it is a "fixed principle of our Constitution" that a citizen cannot be compelled to bear arms "if he has conscientious religious scruples against doing so"], if it means what it seems to say, is an astonishing statement. Of course, there is no such principle of the Constitution, fixed or otherwise. The conscientious

See *Girouard* v. *United States*, 328 U. S. 61, 69. Section 6 (j) of the present Act (Appendix, *infra*, pp. 54–56) specifically exempts conscientious objectors from combatant service, and, indeed, from noncombatant service if the conscientious objection extends to that type of service as well.[18]

objector is relieved from the obligation to bear arms in obedience to no constitutional provision, express or implied; but because, and only because, it has accorded with the policy of Congress thus to relieve him. * * * The privilege of the native-born conscientious objector to avoid bearing arms comes not from the Constitution, but from the acts of Congress. That body may grant or withhold the exemption as in its wisdom it sees fit; and if it be withheld, the native-born conscientious objector cannot successfully assert the privilege. No other conclusion is compatible with the well-nigh limitless extent of the war powers as above illustrated, which include, by necessary implication, the power, in the last extremity, to compel the armed service of any citizen in the land, without regard to his objections or his views in respect of the justice or morality of the particular war or of war in general" (*United States* v. *Macintosh*, *supra*, 283 U. S. at 623–624). And see pp. 38–43 of the Government's brief in *Girouard* v. *United States*, No. 572, O. T. 1945, wherein are collected historical materials showing that a proposed constitutional amendment exempting conscientious objectors from the duty to bear arms failed of adoption, after due consideration.

Petitioner does not now challenge the power of Congress to enact a so-called "peacetime draft," Br. 14.

[18] The challenge in the petition for certiorari (p. 12), not repeated in petitioner's brief on the merits, of Section 6 (j) as a "law respecting an establishment of religion," within the proscription of the First Amendment, because it limits exemption from military service to those conscientiously opposed to war "by reason of religious training and belief," which is defined as "an individual's belief *in a relation to a Supreme Being*, &c." [italics supplied], is plainly not raisable in a case, such as this, involving prosecution for refusal

And the subsection carefully safeguards the rights of registrants claiming to be conscientious objectors in consequence of religious conviction, whose claims are not sustained by their local boards, by setting up adequate appeal machinery. But petitioner's offense was counseling another to refuse even to register, *i. e.*, to be enrolled for classification purposes under the Act. Clearly, for the reasons stated, nothing in the First Amendment restrains Congress from imposing that requirement or from penalizing those who counsel disobedience of it.

III

THE "CLEAR AND PRESENT DANGER" TEST IS NOT APPLICABLE, BUT, IN ANY EVENT, ITS REQUIREMENTS HAVE BEEN FULFILLED

The trial court instructed the jury, in pertinent part, as follows (italics supplied):

> You are further charged that it is not necessary in this case for the government to prove that the counseling, aiding and abetting charged against Larry Gara ac-

or counseling refusal *to register*. See *Richter* v. *United States*, 181 F. 2d 591, 594 (C. A. 9): "Appellant, in addition to the foregoing contentions, challenges the constitutional validity of the exemption and conscription provisions of the Selective Service Act [of 1948]. The registration provisions, which he violated, are, however, separable from the other provisions of the statute, and until compliance with the registration requirements, at least, he has no standing to attack the other sections to which he has not as yet made himself subject, and to which he might never be subject."

tually accomplished its purpose by way of causing Charles Ray Rickert to refuse or evade registration. The Act does not so require. The Act merely says "any person who knowingly counsels, aids or abets another to refuse or evade registration." The real question is whether the words used were knowingly used in such circumstances and were of such a nature as that they *would have a tendency to cause a refusal of duty as required by the Act* * * * [R. 167].

* * * * *

* * * In its wisdom Congress has provided * * * that any person who knowingly counsels, aids or abets another to refuse or evade registration or service in the armed forces * * * shall, upon conviction, be punished as thereinafter provided. This was and is a prerogative of the Congress, and the right of free speech does not extend to such a point as to permit an individual to knowingly violate the law and then excuse the violation by alleging a reliance upon the First Amendment to the Constitution which grants him the right of free speech [R. 168].

* * * You are instructed that if what the defendant knowingly said to Rickert on the 8th day of November, 1948, under the circumstances then and there present, was of such a nature that it *had a tendency to encourage or cause Rickert to continue his refusal to register under the Selective*

Service Act of 1948, whether or not it actually had that effect, it would constitute an offense within the meaning of this Act, as charged in the second count of the indictment [R. 169].

* * * * *

You are instructed that * * * Rickert, having refused to register on September 10, 1948, which was the day prescribed for men of his age, had the continuing duty to register after that date and on November 8, 1948; and if you find * * * that the defendant on November 8, 1948, counseled, aided or abetted Rickert to evade or refuse registration or in continuing his refusal to register, and that the defendant did so knowingly, * * * or if the natural and probable effect of what the defendant said to Rickert on November 8, 1948, under the circumstances there and then present, was of such a nature that it *had a tendency to cause Rickert to continue his refusal to register under the Selective Service Act of 1948,* whether or not it actually had that effect, you will find the defendant guilty as charged in the second count of the indictment [R. 172].

Petitioner contends (Pet. 13–14; and cf. Br. 20–23 with Br. 14–17) that the italicized portions of the quoted instructions, *supra*—authorizing the jury to find him guilty if his words to Rickert on November 8, 1948, "had a tendency" to cause Rickert to continue his refusal to register—were erroneous

because violative of the "clear and present danger" doctrine. This doctrine he also rejects as an invalid tempering of the absolutism of the First Amendment, but he is willing *arguendo,* to assume its constitutional justification (Br. 16). So assuming, he argues, apparently, that he was entitled to have the jury instructed that he could be found guilty only if, in the opinion of the jury, his words to Rickert created a "clear and present danger" that they would bring about the substantive evil—refusal to register by one bound to register under the Act—which Congress sought, and had a right to seek, to prevent. There are at least four answers to this contention.

First, no such contention was presented to the trial judge at the time of the instruction.[19] The only objection to the instructions, of possible present relevance, was as follows (R. 175): "The court in a number of parts of its charge has referred to clear and present danger. We except to that because in this case there is no evidence of clear and present danger."[20] This clearly did not

[19] See Rule 30, F. R. Crim. P., providing: "* * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. * * *"

[20] The passages of the instructions to which reference was made were as follows:

"You are instructed that words which, ordinarily and in many places, would be within the freedom of speech protected by the First Amendment, may become subject to prohibition when of such a nature and used in such circumstances

raise the point now urged, that the question of "clear and present danger" should have been submitted to the jury.

Secondly, as pointed out in *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 571–572, "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem" for the reason that they "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Counseling the commission of crime—whether the crime be murder (cf. Mr. Justice Holmes, dissenting in *Abrams* v. *United States,* 250 U. S. 616, 627) or any other crime—would seem clearly to be an utterance of this type. The criminality of crime-counseling is as old as the common law,[21] and, at least since the adoption

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as to create a clear and present danger that they will bring about the substantive evils which Congress has a right to prevent [R. 168].

* * * * *

"You are instructed that it is the law that although one is not punished in these United States for his religious views and beliefs, yet one may be punished when through external conduct these views are put into practice, if such practice is fraught with clear and present danger to the safety, morals, health or general welfare of the community, and is violative of laws enacted for their protection. * * *" [R. 169.]

[21] At common law, one who procured, commanded, or counseled the commission of any crime was an accessory

of the Criminal Code of 1909, Federal statutory law has made no distinction between one who counsels the commission of a crime and the principal.[22] In the light of this history, we submit, it is idle to contend that the punishment of counseling the commission of a specifically defined offense raises any First Amendment problem, much less any problem of "clear and present danger."

Thirdly, that the "clear and present danger" test has no application in a case of this type—where Congress has specifically prescribed utter-

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before the fact to its commission (Clark and Marshall, *Law of Crimes* (4th ed. 1940), §§ 169–174) and was liable to the same punishment as the principal. *Id.*, § 158.

[22] Section 332 of the Criminal Code of 1909 (18 U. S. C. [1946 ed.] 550; now 18 U. S. C. 2 (a)) provided: "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal."

As early as 1790, Congress made it an offense punishable by death for any person to "aid and assist, procure, command, counsel, or advise" the commission of murder, robbery, or piracy on the high seas (Act of April 23, 1790, c. 9, § 10, 1 Stat. 114; later revised and codified as § 5323 of the Revised Statutes). In 1870, Congress provided that anyone who should "aid or abet * * * or counsel, advise, or procure" the commission of any of certain designated offenses relating to the naturalization of aliens should be "liable to indictment and punishment in the same manner and to the same extent as the principal party guilty of such felony" (Act of July 14, 1870, c. 254, § 2, 16 Stat. 254–255; later revised and codified as § 5427 of the Revised Statutes). The general aider-and-abettor statute (Criminal Code, § 332, *supra*) was derived from these earlier statutes, which were limited in their application to certain specific types of offenses.

ances of the kind sought to be punished—is clear from this Court's holding in *Gitlow* v. *New York,* 268 U. S. 652. In Section 1 (b) of the Selective Service Act (Appendix, *infra,* p. 53), Congress has declared that "an adequate armed strength must be achieved and maintained to insure the security of this Nation." In implementation of this solemnly declared need, it has provided for the building up of an adequate armed force by the process of conscription: "Except as otherwise provided in this title, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of nineteen and twenty-six * * * shall be liable for training and service in the armed forces of the United States" (Section 4 (a), Appendix, *infra,* p. 54). As the first step in the conscriptive process, it has imposed the duty of registration on "every male citizen of the United States, and every other male person residing in the United States, who * * * is between the ages of eighteen and twenty-six" (Section 3, Appendix, *infra,* p. 54). Finally, to insure the success of the program, it has declared it to be a punishable offense, not only to evade or refuse registration or service, but *knowingly to counsel* another to evade or refuse registration or service (Section 12 (a), Appendix, *infra,* pp. 56–57).

Unlike the statutory language involved in *Schenck* v. *United States,* 249 U. S. 47 (cause insubordination and obstruct recruiting), the words

used in Section 12 (a) embody a specific prohibition against the use of language—counseling—designed to dissuade persons required to register under the Act from registering. The inclusion of such a prohibition is manifestly a reasonable and appropriate means to achieve the end of insuring that all male persons within the specified age limits be registered for inventory and classification purposes. As we have shown (*supra*, pp. 30–37), the draft program as a whole, and the specific prohibition, in particular, against utterances counseling non-registration, were plainly within the constitutional power of Congress to enact. This being so, as this Court pointed out in the *Gitlow* case, 268 U. S. at 670–671, the proscription against counseling—

> * * * may be applied to every utterance—not too trivial to be beneath the notice of the law—which is of such a character and used with such intent and purpose as to bring it within the prohibition of the statute. * * * *In other words, when the legislative body has determined generally, in the constitutional exercise of its discretion, that utterances of a certain kind involve such danger of substantive evil that they may be punished, the question whether any specific utterance coming within the prohibited class is likely, in and of itself, to bring about the substantive evil, is not open to consideration. It is sufficient that the statute itself be consti-*

tutional and that the use of the language comes within its prohibition.

It is clear that the question in such cases is entirely different from that involved in those cases where the statute merely prohibits certain acts involving the danger of substantive evil, without any reference to language itself, and it is sought to apply its provisions to language used by the defendant for the purpose of bringing about the prohibited results. There, if it be contended that the statute cannot be applied to the language used by the defendant because of its protection by the freedom of speech or press, it must necessarily be found, as an original question, without any previous determination by the legislative body, whether the specific language used involved such likelihood of bringing about the substantive evil as to deprive it of the constitutional protection. In such cases it has been held that the general provisions of the statute may be constitutionally applied to the specific utterance of the defendant if its natural tendency and probable effect was to bring about the substantive evil which the legislative body might prevent. [Citing *Schenck* v. *United States,* 249 U. S. 47, 51; and *Debs* v. *United States,* 249 U. S. 211, 215, 216.] And the general statement in the *Schenck* case (p. 52) that the "question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger

> that they will bring about the substantive evils,"—upon which great reliance is placed in the defendant's argument—was manifestly intended, as shown by the context, to apply only in cases of this class, and has no application to those like the present, where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character.[23] [Italics supplied.]

Finally, even if the "clear and present danger" test were applicable here, its requirements have been fulfilled. The issue on this aspect of the case would be whether there was a clear and present danger that petitioner's counsel to Rickert would result in Rickert's refusal to register and whether that and its concomitants would be a sufficiently serious substantive evil to

[23] To the same effect, see *Whitney* v. *California*, 274 U. S. 357, 371–372, which also pointed out (p. 371) that the legislative determination that specified acts or utterances should be punished "must be given great weight. Every presumption is to be indulged in favor of the validity of the statute * * *; and it may not be declared unconstitutional unless it is an arbitrary or unreasonable attempt to exercise the authority vested in the State in the public interest." And see *Bridges* v. *California*, 314 U. S. 252, 260–261, where, in distinguishing the *Gitlow* case, this Court pointed out that "here the legislature of California has not appraised a particular kind of situation and found a specific danger sufficiently imminent to justify a restriction on a particular kind of utterance. The judgments below, therefore, do not come to us encased in the armor wrought by prior legislative deliberation."

warrant repression of speech (*Bridges* v. *California,* 314 U. S. 252, 263). The answer, we submit, is clear. Were the speaker's relationship with his auditor a less intimate one, were his influence on the person being counselled less strong than that of dean on student, the question might be more difficult. But when, as here, the dean advises his student "not to register" (see *supra,* pp. 9, 10), seeks "as much as possible to identify [himself] with" Rickert (R. 125), and advises him to "stand by your principles" (R. 29), the danger of continued and firmer resistance to registration is clear and present if those words have any meaning. And the danger certainly relates to an evil which Congress has a right to prevent—refusal to register under a draft law. See *supra,* pp. 30–37.

Nor can the interest of the Government in enforcement of its selective service law "be classified as an effort to outlaw only a slight public inconvenience or annoyance." *Giboney* v. *Empire Storage Co.,* 336 U. S. 490, 502; cf. *Schneider* v. *State,* 308 U. S. 147. When the Selective Service Act of 1948 was passed and when this case was tried, the "danger of attack by our present enemies, if not imminent, was real, as subsequent events have grimly demonstrated. The Congress was faced with the urgent necessity of integrating all the nation's people and forces for national defense. That dire consequences might flow from

apathy and delay was well understood." *Falbo* v. *United States,* 320 U. S. 549, 551.

The evil attendant on Rickert's refusal to register and the support others might derive from the stand petitioner counseled Rickert to take is hardly less serious than the breach of peace deemed sufficient in *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, or the violation of state anti-trust laws found adequate to justify repression in *Giboney* v. *Empire Storage Co.,* 336 U. S. 490. Indeed, from a recent cataloguing by this Court of the evils held sufficiently serious to warrant intrusions on freedom of speech, it appears that few, if any, have been more grave than that here involved. *American Communications Assn.* v. *Douds,* 339 U. S. 382, 398:

> * * * the right of the public to be protected from evils of conduct, even though First Amendment rights of persons or groups are thereby in some manner infringed, has received frequent and consistent recognition by this Court. We have noted that the blaring sound truck invades the privacy of the home and may drown out others who wish to be heard. *Kovacs* v. *Cooper,* 336 U. S. 77 (1949). The unauthorized parade through city streets by a religious or political group disrupts traffic and may prevent the discharge of the most essential obligations of local government. *Cox* v. *New Hampshire,* 312 U. S. 569, 574 (1941). The exercise of particular First Amendment rights may fly in the face of the public interest in the

> health of children, *Prince* v. *Massachusetts,* 321 U. S. 158 (1944), or of the whole community, *Jacobson* v. *Massachusetts,* 197 U. S. 11 (1905), and it may be offensive to the moral standards of the community, *Reynolds* v. *United States,* 98 U. S. 145 (1878); *Davis* v. *Beason,* 133 U. S. 333 (1890). And Government's obligation to provide an efficient public service, *United Public Workers* v. *Mitchell,* 330 U. S. 75 (1947), and its interest in the character of members of the bar, *In re Summers,* 325 U. S. 561 (1945), sometimes admit of limitations upon rights set out in the First Amendment.

Moreover, when, as here, the evidence of petitioner's purpose to violate the Selective Service Act is as clear as it is (see *supra,* pp. 10–14), it may very well be that that specific intent is a substitute for, or equivalent to, a finding of clear and present danger. As Mr. Justice Holmes, dissenting in *Abrams* v. *United States,* 250 U. S. 616, 627–628, put it:

> I never have seen any reason to doubt that the questions of law that alone were before this Court in the cases of *Schenck, Frohwerk,* and *Debs,* 249 U. S. 47, 204, 211, were rightly decided. I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces *or is intended to produce* a clear and imminent danger that will bring about forth-

with certain substantive evils that the United States constitutionally may seek to prevent. The power undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times.

But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil *or an intent to bring it about* that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all efforts to change the mind of the country. Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so. *Publishing those opinions for the very purpose of obstructing, however, might indicate a greater danger and at any rate would have the quality of an attempt.* So I assume that the second leaflet if published for the purpose alleged in the fourth count might be punishable. But it seems pretty clear to me that nothing less than that would bring these papers within the scope of this law. An actual intent in the sense that I have explained is necessary to constitute an attempt, where a further act of the same individual is required to complete the substantive crime, for reasons given in *Swift*

> *& Co.* v. *United States,* 196 U. S. 375, 396. It is necessary where the success of the attempt depends upon others because if that intent is not present the actor's aim may be accomplished without bringing about the evils sought to be checked. An intent to prevent interference with the revolution in Russia might have been satisfied without any hindrance to carrying on the war in which we were engaged. [Italics supplied.]

And in *Whitney* v. *California,* 274 U. S. at 373, Mr. Justice Brandeis, concurring, stated that—

> * * * the necessity which is essential to a valid restriction does not exist unless speech would produce, *or is intended to produce,* a clear and present danger of some substantive evil which the State constitutionally may seek to prevent * * *. [Italics supplied.]

It is significant that in *American Communications Association* v. *Douds,* 339 U. S. 382, 395, this Court quoted with approval this statement of Mr. Justice Brandeis.

Because words "used as an essential and inseparable part of a grave offense against an important public law cannot immunize that unlawful conduct from state control", and because "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed"

(*Giboney* v. *Empire Storage Co.*, 336 U. S. 490, 502), it is evident that the "clear and present danger" test, if at all applicable to this case, has been met.[24]

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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[24] Petitioner also argues that Section 12 (a) of the Act, providing for the punishment of any person "who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces" (Appendix, *infra*, p. 56), is "void for vagueness" (Br. 17–20). But the prohibition, it seems to us, is phrased as clearly and unambiguously as language permits. In the light of the usage at common law, and in our statutes since the beginning of the nation, of the words "counsel, aid, or abet" (see pp. 41–42, *supra*, and fns. 21 and 22), it is evident that petitioner's contention that a statute embodying these words is too indefinite has long since been put to rest by centuries of application of those words to describe acts criminally punishable. Cases like *Connally* v. *General Construction Co.*, 269 U. S. 385, and *United States* v. *Cohen Grocery Co.*, 255 U. S. 81 (cited by petitioner, Br. 17), declaring invalid the statutes there involved as lacking ascertainable standards of guilt, are plainly inapposite.

APPENDIX

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Article I, Section 8, of the Constitution provides in pertinent part:

> The Congress shall have Power * * *
> * * * * *
> To declare War * * *;
> To raise and support Armies * * *;
> To provide and maintain a Navy;
> * * * * *
> And To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

The First Amendment provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech * * *.

The Selective Service Act of June 24, 1948, c. 625, Title I, 62 Stat. 604, *et seq.*, provides in pertinent part:

> SECTION 1 [50 U. S. C. App., Supp. III, 451]. * * *
> (b) The Congress hereby declares that an adequate armed strength must be achieved and maintained to insure the security of this Nation.
> * * * * *

SEC. 3 [50 U. S. C. App., Supp. III, 453]. Except as otherwise provided in this title, it shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder.

SEC. 4 [50 U. S. C. App., Supp. III, 454]. (a) Except as otherwise provided in this title, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of nineteen and twenty-six, at the time fixed for his registration, or who attains the age of nineteen after having been required to register pursuant to section 3 of this title, shall be liable for training and service in the armed forces of the United States. * * *

* * * * *

SEC. 6 [50 U. S. C. App., Supp. III, 456]. * * *

* * * * *

(j) Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior

to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, be deferred. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall be deferred. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained.

The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors.

* * * * *

SEC. 10 [50 U. S. C. App., Supp. III, 460]. * * *

* * * * *

(b) The President is authorized—

(1) To prescribe the necessary rules and regulations to carry out the provisions of this title;

* * * * *

SEC. 12 [50 U. S. C. App., Supp. III, 462]. (a) Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, * * * or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title, or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title, or of said rules, regulations, or directions, * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years

or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

* * * * *

Section 611.6 (d) of the Selective Service Regulations, issued on July 20, 1948 (E. O. 9979, 13 F. R. 4177, 4180; now codified as 32 C. F. R. (1949 ed.) 1611.6 (d)), provides:

§ 611.6 *Responsibility for performance of duty.* * * *

(d) The duty of every person subject to registration to present himself for and submit to registration shall continue at all times, and if for any reason any such person is not registered on the day or one of the days fixed for his registration, he shall immediately present himself for and submit to registration before the local board in the area where he happens to be.

* * * * *

Sections 613.11, 613.13, and 613.16 of the Selective Service Regulations, issued on August 2, 1948 (13 F. R. 4535–4536; now codified as 32 C. F. R. (1949 ed.) 1613.11, 1613.13, and 1613.16, respectively), provide in pertinent part:

§ 613.11 *Interview of the registrant.* (a) All persons who present themselves for registration shall be registered on a Registration Card (SSS Form No. 1). All entries on the Registration Card (SSS Form No. 1) must be made by the registrar and shall be in ink, clear and legible. The registrar shall not permit anyone other than himself to write on the Registration Card (SSS Form No. 1) except when the registrant signs the completed card.

* * * * *

(c) The registrar shall ask the registrant for the information necessary to complete the entries on lines 1 to 15, inclusive, of the Registration Card (SSS Form No. 1), and shall enter such information on the proper lines of the card. * * *

* * * * *

§ 613.13 *Registrant's signature.* (a) When the provisions of §§ 613.11 and 613.12 have been carried out, the registrar shall have the registrant verify the correctness of the entries on the Registration Card (SSS Form No. 1).

(b) The registrant shall then sign his name, exactly as he usually signs it, in the space on the Registration Card (SSS Form No. 1) provided for his signature. If he cannot sign his name, he shall make his mark, and the registrar shall then write in after the mark the words "The mark of _____ made in my
(Name of registrant)
presence" and shall sign his own name thereunder, followed by the word "Registrar."

(c) If the registrant is unable or refuses to sign the Registration Card (SSS Form No. 1) or to make a mark in lieu of such signature, the registrar shall sign such registrant's name and indicate that he has done so by signing his own name, followed by the word "Registrar" beneath the name of such registrant, and the act of the registrar in so doing shall have the same force and effect as if such registrant had signed the Registration Card (SSS Form No. 1), and such registrant shall thereby be registered.

* * * * *

§ 613.16 *Recalcitrants.* If a registrant refuses to cooperate or is inclined to evade, refuses to answer, or to answer falsely, his attention should be called to the penal provisions of Title I of the Selective Service Act of 1948. If he is still refractory, witnesses should be called, and after the penalty of the law has been explained again to him in the presence and hearing of witnesses, a full opportunity should be given him to reconsider his actions and answer the questions. If he is still refractory, his name and the names of the witnesses should be noted and the case immediately reported to the United States district attorney. * * *

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